No. 88-1400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA; LEONARD WILSON, Individually and as District Manager, Chicago Office of the Franchise Tax Board of the State of California; and B. M. RARANG, Individually and as Auditor, Chicago Office of the Franchise Tax Board of the State of California,

Petitioners,

v.

ALCAN ALUMINIUM LIMITED and IMPERIAL CHEMICAL INDUSTRIES PLC,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as amicus curiae in support of respondents in the above-

captioned case. Written consents of the Petitioners and the Respondents have been obtained and are attached herewith.

INTEREST OF *AMICUS CURIAE*

This brief in support of Respondents Alcan Aluminium Limited and Imperial Chemical Industries is submitted by the Committee on State Taxation (COST) of the Council of State Chambers of Commerce. The Council of State Chambers of Commerce (Council), organized in 1932, consists of 43 state chambers of commerce. COST, one of three advisory committees of the Council, consists of 315 corporate members which conduct a substantial portion of the interstate and foreign commerce of United States taxpayers. The majority of COST members are American parent companies. COST is primarily involved in working with states and others to achieve equitable standards of state taxation. Because of the potential for retaliatory legislation by foreign nations to permit the use of unitary taxation which will have a severe negative impact upon American parent companies operating abroad, COST vehemently opposes California's forced application of the Worldwide Method of Combined Apportionment (WCA).

Member firms of COST invest heavily in overseas markets. This is required by the modern business environment. In order to remain economically viable, companies must gain access to needed supplies of resources, and tap the potential of relevant markets. In many cases, the fact that competitors are engaged in international trade requires firms to expand their markets.

The imposition of WCA is functionally equivalent to erecting a barrier to free trade among nations. WCA not only assesses revenues earned inside the forum but also revenues earned outside the forum; indeed if WCA were adopted by all nations it would create a huge and unacceptable cost of doing business. It should be no surprise, therefore, that California's use of WCA is offensive to America's foreign trading partners.[1]

COST harbors no doubt if WCA is required that retaliatory legislation by foreign nations will be implemented and will adversely impact its member firms. It will alter the way in which business decisions are made to the detriment of the world's economy. Rather than looking at market considerations, companies will be stymied by the tax ramifications of intended actions. Such an environment is bad for business, bad for trade and bad for consumers.

Foreign governments cannot be expected to give double tax relief to their own nationals for taxes that are imposed by California on income that is not sourced in California. As a result, retaliation may be expected to take the form of denying tax relief to U.S. businesses. *See*, N.C. 27 Finance Act of 1985, as enacted by the United Kingdom Parliment.

In a business climate controlled by the retaliatory WCA tax policies of foreign nations, it is the parent and not the subsidiary which bears the impact of the tax.

Respondents are before this Court as foreign parents with American subsidiaries. If they are not permitted a

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[1] As the Seventh Circuit noted in pertinent part: "To the extent that California's franchise tax burdens foreign companies' decisions to conduct business through subsidiaries in California, it threatens to offend this Country's trading partners, many of whom must deal with conflicting internal views of the proper role of American investment in their economies, and to elicit retaliatory measures. . . . The record in this case contains numerous indications that foreign governments view California's and other states' sharp departures from the international norm of taxing corporate income based on transactional allocations of income as a source of serious injury to multinationals located within their borders and a threat to commercial relations with the United States." Alcan Aluminium Ltd. v. Franchise Tax Board, No. 87-2289 (7th Cir., 1988), Imperial Chemical Industries, PLC v. Franchise Tax Board, No. 87-2295, Slip Op. at 21 (7th Cir. 1988).

remedy to object to WCA, it is only a brief matter of time before American companies will see themselves in the same position in a foreign tribunal. In such a situation, a United States parent corporation would demand the right to represent its' own case to the foreign tribunal. We expect that the United States would afford nothing less than our expectation to foreign corporations with American subsidiaries.

STATEMENTS OF FACT

Amicus adopts the Statement of the Case set forth in Respondents' Briefs on the Merits.

SUMMARY OF ARGUMENT

This case presents an issue of major importance for all multinational corporations, both foreign and domestic. The Worldwide Method of forced Combined Apportionment utilized by the State of California is a system of taxation which threatens the conduct of international trade. Threatened retaliatory legislation by foreign nations places American companies with overseas subsidiaries in a position identical to that which faces Respondents.

Amicus urges that Respondents be permitted to present their complaint before the Federal District Court for the very reasons that American parent companies in the position of Respondents would seek to be heard before foreign tribunals. It is the parent company, not the foreign subsidiary acting as a surrogate, which can most clearly and precisely state its grievance to the court.

ARGUMENT

THE NATURE OF FORCED WORLDWIDE COMBINED APPORTIONMENT MAKES ITS INJURY FELT BY THE PARENT COMPANY.

Little more than a century ago, American trade wars were fought from an interstate perspective. Today, we deal from a world economic viewpoint in which America is only one marketplace. In numerous areas, a corporation's viability depends on its capacity to enter and serve markets outside the United States. In some cases, the fixed costs of production are so high that in order to make a commodity affordable to consumers, it must be produced in mass quantity and distributed across a huge population. Raw materials necessary for production may be available only in certain locations, or only limited quantities of the material may be found in any one area. In such cases, engaging in foreign activity may be required just to stay in business. Likewise, it may be necessary to find new avenues for product distribution as old markets become saturated.

There are any number of reasons for operating in foreign countries. However, one thing is clear, as the world's economy continues to grow, participation in foreign commerce is becoming compulsory. This is true for both foreign companies with American subsidiaries and American compaines with foreign subsidiaries. The era of isolationism has long passed and companies cannot expect to survive by operating in the past.

The difficulty with California's use of WCA is that it is inconsistent with the agreement reached between nations for the ordered conduct of foreign commerce. There are sound reasons for using the arm's length standard. First, formula apportionment, by its nature, tends to favor one economic environment over another. Consequently, there could be no international agreement on a common formula. Second, the arm's length standard is based on marketplace value and the marketplace is beyond the manipulation of any one nation.

Moreover, the arms' length standard does not require multinationals to keep burdensome accounting records in various systems and currencies. As Americans, we sometimes tend to ignore the costs being imposed by our actions on our foreign neighbors. If WCA was imposed on us by foreign nations, we would suffer enormous burdens. For example, under a system of unitary taxation, suppliers in Atlanta, Georgia, or manufacturers in Muncie, Indiana, with subsidiaries in perhaps 100 foreign markets would find themselves subject to not only state and federal taxes on their earnings in the United States, but also to a range of tax liability permutations, such as paying Japanese taxes on their United States, West German and Italian income. This problem expands geometrically when one considers that the difficulties of compliance are multiplied under WCA as each of the 100 nations in which the Atlanta and Muncie-based companies in this example operates uses different apportionment factors in their tax computations. Naturally, the nations will choose those factors which provide the most revenue. For example, where labor is cheap, work-hours could be a factor, and where labor is expensive, payroll could be a factor; where real estate is expensive, property could be a factor. India could consider factors relevant which Japan may find useless.

American companies will be forced to spend thousands of hours and millions of dollars developing accounting systems to comply with the individual reporting requirements. Just to serve their overseas markets, the American companies will be required to develop the capacity to translate all of their records into the currency of each country in which it has a subsidiary, and then break down those records according to different mathematical formulae. The administrative costs alone would be staggering, but the problem is exacerbated by the high likelihood that the American companies would face a crisis of multiple taxation. American corporations no longer would seek to expand their operations by exploiting markets

for their commercial potential; rather, their business decisions would be motivated in large measure by the tax consequences.

American-based parent corporations expect United States courts to recognize foreign parents' rights to seek vindication of their injury here as they would expect foreign courts to recognize their right to bring an action should WCA be imposed upon them by a foreign country. If this Court decides that the foreign parent does not have standing, it will severely prejudice the ability of United States based parents seeking to complain of similar injuries in foreign courts.

CONCLUSION

California's forced use of WCA has directly injured Respondents. Respondents seek redress in federal court because they do not have access to a state court remedy. Respondents currently face a situation which soon may confront American corporations with foreign subsidiaries. What the Court decides in this case will affect the treatment of American companies with subsidiaries abroad. Judgment should be entered in favor of the Respondents, affirming the view of the Seventh Circuit.

Respectfully submitted,

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